

August 27, 2003

Dr. Ronald L. Simard
Nuclear Energy Institute
1776 I Street, NW, Suite 400
Washington, DC 20006-3708

SUBJECT: RESOLUTION OF EARLY SITE PERMIT TOPIC 9 (ESP-9), CRITERIA FOR
ASSURING CONTROL OF THE SITE BY THE ESP HOLDER

Dear Dr. Simard:

The purpose of this letter is to inform you of our understandings and expectations regarding the criteria for assuring control of the site by an ESP holder. This topic, which is identified as ESP-9 on the list of Nuclear Energy Institute (NEI) generic ESP issues, was discussed at a public meeting on March 5, 2003. Subsequently, NEI documented its position on this topic in a letter dated May 2, 2003.

In your May 2, 2003 letter, you expressed your belief that, because an ESP does not grant approval to conduct work activities, except in accordance with Title 10 of the *Code of Federal Regulations* (10 CFR), Section 52.17(c), the degree of control over the site that an ESP applicant must demonstrate is considerably less than the control that must be demonstrated by a COL applicant. However, your letter did not provide any further basis for this belief. Moreover, your letter did not address Nuclear Regulatory Commission (NRC) regulations and guidance that deal with control of the site.

As required by 10 CFR 52.17(a)(1), site characteristics contained in an ESP application must comply with 10 CFR Part 100. Requirements addressing control of the site are contained in 10 CFR 100.21(a) which states that every site must have an exclusion area and a low population zone, as defined in 10 CFR 100.3. The definition of an exclusion area in 10 CFR 100.3 is as follows:

Exclusion area means that area surrounding the reactor, in which the reactor licensee has the authority to determine all activities including exclusion or removal of personnel and property from the area. This area may be traversed by a highway, railroad, or waterway, provided these are not so close to the facility as to interfere with normal operations of the facility and provided appropriate and effective arrangements are made to control traffic on the highway, railroad, or waterway, in case of emergency, to protect the public health and safety. Residence within the exclusion area shall normally be prohibited. In any event, residents shall be subject to ready removal in case of necessity. Activities unrelated to operation of the reactor may be permitted in an exclusion area under appropriate limitations, provided that no significant hazards to the public health and safety will result.

The NRC's guidance for the review of an ESP applicant's implementation of these requirements can be found in draft NRR Review Standard (RS)-002, "Processing Applications for Early Site Permits," Attachment 2, Section 2.1.2, "Exclusion Area Authority and Control." In Section 2.1.2, the review guidance states that, in order to meet the requirements of 10 CFR Part 100, the applicant must demonstrate, prior to issuance of an ESP, that it has the authority within the exclusion area as required by Section 100.3, or must provide reasonable assurance that it will have such authority prior to the start of construction. Absolute ownership of all lands within the exclusion area, including mineral rights, is considered to carry with it the required authority to determine all activities on the land and is acceptable.

RS-002 further states that, where the required authority is contingent upon future procurement of ownership (e.g., by eminent domain proceedings), or by lease, easement, contract, or other means, the exclusion area may be acceptable if the NRC can determine that the information provided by the applicant provides reasonable assurance that the required authority will be obtained prior to start of construction. In cases where ownership and control is to be acquired or completed during a construction period, the NRC will need to perform a special review. Also, in cases of proposed public road abandonment or relocation, the NRC needs to determine that there is sufficient authority or that sufficient arrangements have been made to accomplish the proposed relocation or abandonment. At the combined license (COL) stage of review, the applicant must have completed arrangements to determine all activities within the exclusion area. The applicant will not be permitted to load fuel until exclusion area authority and control, including all transfers of title, easements, lease arrangements, public road abandonments or relocations, as applicable, are completed.

Given this regulatory background, the discussion below is our response to the relevant understandings and expectations identified in your May 2, 2003, letter.

1. An ESP can have joint holders.

Staff response: The staff agrees that an ESP can have joint holders.

2. If one or both of the ESP holders owns the property that is the subject of the ESP, unless otherwise specified in the ESP application, it is assumed that the ESP holder has sufficient legal rights and authority over the property to carry out the objectives of the ESP, and that it has the authority to satisfy the requirements of 10 CFR 52.35 (Use Of The Site For Other Purposes).

Staff response: The staff agrees in part. As is stated above in the excerpt from RS-002, Section 2.1.2, absolute ownership of all lands within the exclusion area, including mineral rights, is considered to carry with it the required authority to determine all activities on the land and is acceptable. As is stated in 10 CFR 52.35, a site for which an ESP has been issued may be used for purposes other than those described in the permit, including the location of other types of energy facilities. However, the permit holder must inform the Director of Nuclear Reactor Regulation of any significant uses for the site which have not been approved in the ESP. The information about the activities must be given to the Director in advance of any actual construction or site modification for the activities. The information provided could be the basis for imposing new requirements on the permit, in accordance with the provisions of 10 CFR 52.39. Owning the property covered by the ESP does not exempt the ESP holder from the requirements of 10 CFR 52.35.

3. If the ESP holder (or neither ESP holder in the case of joint permit holders) does not own the property that is the subject of the ESP, the ESP applicant must attest in the application to the fact that the ESP holder has been granted, or will be granted at the appropriate time, sufficient legal rights and authority over the property to carry out the objectives of the ESP. Further, the ESP holder will establish the appropriate relationship with the property owner to satisfy the requirements of 10 CFR 52.35.

AND

4. For the purposes of this ESP-9 generic issue, sufficient legal rights and authority means that the ESP holder(s), among other things:
 - can make emergency planning agreements pursuant to 10 CFR 52.17(b)(3);
 - will be responsible for the conduct of ESP-authorized pre-COL construction activities pursuant to 10 CFR 50.10(e)(1) and 10 CFR 52.17(c); and
 - will be responsible for the implementation of a redress plan, as applicable.

Staff response: The staff agrees, in part. As is stated above in the excerpt from RS-002, Section 2.1.2, where the required authority is contingent upon future procurement of ownership (e.g., by eminent domain proceedings), or by lease, easement, contract, or other means, the exclusion area may be acceptable if the NRC can determine that the information provided by the applicant provides reasonable assurance that the required authority will be obtained prior to start of construction. To meet the exclusion area control requirement of 10 CFR 100.21(a) and 100.3, it is not necessary that an ESP applicant demonstrate total control of the property prior to issuance of an ESP. However, the applicant must provide the staff with sufficient information to determine that there is reasonable assurance that, prior to commencing activities allowed by 10 CFR 52.25, the applicant will have the authority to control all activities within the exclusion area, including the exclusion or removal of people and property from the area. In addition, where the applicant submits a redress plan, there must be reasonable assurance that the applicant will have the authority to carry out that redress plan. In determining what constitutes reasonable assurance, the staff will look to precedent set in previous NRC decisions involving the issuance of construction permits and limited work authorizations.¹ In the event that an ESP applicant does not have the control required by 10 CFR 100.21(a) and 100.3, but provides reasonable assurance that it will acquire such control, a condition could be placed in the ESP requiring staff confirmation that the applicant has indeed acquired such control.

¹ See, e.g., *Washington Public Power Supply System* (WPPSS Nuclear Project Nos. 3 and 5), LBP-77-25, 5 NRC 964 (April 8, 1977); *Duke Power Company* (Cherokee Nuclear Station, Units 1, 2, and 3), LBP-76-18, 3 NRC 627 (May 21, 1976); and *Duquesne Light Company, et al.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-74-76, 8 AEC 701 (October 20, 1974).

R. Simard

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Please contact Nanette Gilles of my staff at 301-415-1180 if you have any questions on this matter.

Sincerely,

/RA/

James E. Lyons, Program Director
New, Research and Test Reactors Program
Division of Regulatory Improvement Programs
Office of Nuclear Reactor Regulation

Project No. 689

cc: See next page

R. Simard

- 4 -

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ESP-Generic

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